

JOHN CHRISTOPHER ANDERSEN,)	3:10-cv-00067-ECR-VPC
)	
Plaintiff,)	<u>Order</u>
)	
vs.)	
)	
JOHN W. HELZER, Assistant D.A.;)	
RANDY LEBLANC, Sheriff Det.,)	
MARSHAL EMERSON, Sheriff's)	
Commander, HOLLY VANCE, Assistant)	
U.S. Attorney ,)	
)	
Defendants.)	
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On May 10th, 2008, Plaintiff, a resident of Washoe County, gave \$700 along with his pickup truck to a mechanic to repair the truck. (Am. Compl. at 3 (#21); Mot. Summ. J. at 4 (#44).) After various trips to the mechanic's home, Plaintiff surmised that the mechanic had stolen his truck. (Am. Compl. at 3 (#21); Mot. Summ. J. at 4 (#44).) Plaintiff alleges that he "complained to about 8 different [Washoe County] deputies," including Defendant Lieutenant Randy

1 LeBlanc, who was assigned to his case. (Am. Compl. at 3 (#21).) No
2 criminal action was initiated in connection with Plaintiff's police
3 report. (Mot. Summ. J. at 4 (#44); Amd. Compl. at 5-6 (#21).)

4 Plaintiff alleges that he subsequently wrote to Defendant
5 Helzer, an Assistant District Attorney with the Washoe County
6 District Attorney's Office, requesting his assistance with his
7 complaint. (Amd. Compl. at 3 (#21).) Around this time, Plaintiff
8 claims he began hearing loud "noise" on his phone line. (Compl. at
9 4 (#1); Mot. Summ. J. at 4 (#44).) A few days after this, Helzer
10 called Plaintiff into his office; following this interaction,
11 Plaintiff's phone noise disappeared. (Compl. at 4; Mot. Sum. J. at
12 4 (#44).)

13 Plaintiff further alleges that Assistant U.S. Attorney and
14 Defendant Holly Vance ("Vance") "has all the evidence" of an illegal
15 wiretap placed on Plaintiff's telephone by Defendant and that Holly
16 Vance told Plaintiff on the phone that she had access to the
17 evidence. (Am. Compl. at 3-A (#21).) In a sworn affidavit, Vance
18 states that she has no knowledge of any wiretap obtained by Helzer,
19 has no evidence of such a wiretap, and does not recall ever speaking
20 with Plaintiff. (Mot. Summ. J. Ex. A (#44).) Helzer denies having
21 obtained or placed a wiretap on Plaintiff's phone in a sworn
22 affidavit. (Id. Ex. B (#44).)

23 On March 11, 2010, Plaintiff filed the original complaint (#1).
24 The complaint's four counts alleged that (1) Helzer violated
25 Plaintiff's Fourth Amendment rights by placing an illegal wiretap on
26 Plaintiff's telephone; (2) Defendant Lieutenant LeBlanc violated
27 Plaintiff's Fourteenth Amendment rights by failing to act on
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1 Plaintiff's complaints against the mechanic; (3) other officers,
2 particularly Defendant Sheriff's Commander Marshal Emerson, also
3 violated his Fourteenth Amendment rights by failing to act; and (4)
4 Defendant Holly Vance had committed nonfeasance by failing to
5 disclose the wiretap evidence she allegedly possessed and should be
6 forced to disclose her evidence to the court. (Id. at 4-6A.)

7 On December 27, 2010, Plaintiff filed an Amended Complaint
8 (#21).

9 On September 19th, 2011, we dismissed (#32) the second and
10 third counts of the amended complaint (#21), eliminating all of
11 Plaintiff's claims against Defendants Marshal Emerson and Randy
12 LeBlanc. On November 18th, 2011, pursuant to Federal Rule of Civil
13 Procedure 4(m), we dismissed (#40) Plaintiff's claims against
14 Defendant Holly Vance without prejudice. Thus, only Plaintiff's
15 Fourth Amendment wire tapping claim against Defendant Helzer
16 remains.

17 Plaintiff filed a Motion for Relief from Judgment and a Motion
18 for Default Judgment (#42) on February 13, 2012. Defendant Helzer
19 responded (#43) on February 23, 2012, and Plaintiff replied (#46) on
20 March 1, 2012.

21 On February 27, 2012, Defendant Helzer filed a Motion for
22 Summary Judgment (#44) to which Plaintiff has not responded.

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24 **II. Summary Judgment Standard**

25 Summary judgment allows courts to avoid unnecessary trials
26 where no material factual dispute exists. N.W. Motorcycle Ass'n v.
27 U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The court

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1 must view the evidence and the inferences arising therefrom in the
2 light most favorable to the nonmoving party, Bagdadi v. Nazar, 84
3 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment
4 where no genuine issues of material fact remain in dispute and the
5 moving party is entitled to judgment as a matter of law. FED. R.
6 Civ. P. 56(c). Judgment as a matter of law is appropriate where
7 there is no legally sufficient evidentiary basis for a reasonable
8 jury to find for the nonmoving party. FED. R. Civ. P. 50(a). Where
9 reasonable minds could differ on the material facts at issue,
10 however, summary judgment should not be granted. Warren v. City of
11 Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S.
12 1171(1996).

13 The moving party bears the burden of informing the court of the
14 basis for its motion, together with evidence demonstrating the
15 absence of any genuine issue of material fact. Celotex Corp. v.
16 Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met
17 its burden, the party opposing the motion may not rest upon mere
18 allegations or denials in the pleadings, but must set forth specific
19 facts showing that there exists a genuine issue for trial. Anderson
20 v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the
21 parties may submit evidence in an inadmissible form – namely,
22 depositions, admissions, interrogatory answers, and affidavits –
23 only evidence which might be admissible at trial may be considered
24 by a trial court in ruling on a motion for summary judgment. FED.
25 R. Civ. P. 56(c); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d
26 1179, 1181 (9th Cir. 1988).

1 In deciding whether to grant summary judgment, a court must
2 take three necessary steps: (1) it must determine whether a fact is
3 material; (2) it must determine whether there exists a genuine issue
4 for the trier of fact, as determined by the documents submitted to
5 the court; and (3) it must consider that evidence in light of the
6 appropriate standard of proof. Anderson, 477 U.S. at 248. Summary
7 judgment is not proper if material factual issues exist for trial.
8 B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir.
9 1999). "As to materiality, only disputes over facts that might
10 affect the outcome of the suit under the governing law will properly
11 preclude the entry of summary judgment." Anderson, 477 U.S. at 248.
12 Disputes over irrelevant or unnecessary facts should not be
13 considered. Id. Where there is a complete failure of proof on an
14 essential element of the nonmoving party's case, all other facts
15 become immaterial, and the moving party is entitled to judgment as a
16 matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a
17 disfavored procedural shortcut, but rather an integral part of the
18 federal rules as a whole. Id.

19 20 III. Discussion

21 **A. Defendant's Motion for Summary Judgment (#44)**

22 Following this court's orders (## 32, 40) dismissing
23 Plaintiff's claims against Defendants Holly Vance, Marshal Emerson,
24 and Randy LeBlanc, Plaintiff's only remaining claim is against
25 Helzer for violation of Plaintiff's Fourth Amendment rights by
26 illegally wiretapping Plaintiff's telephone. (Am. Compl. Count I
27 (#21).) Defendant Helzer moves for summary judgment on the ground
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1 that "Plaintiff is unable to show through anything other than
2 conclusory allegations and unsubstantiated assertions that there was
3 a wiretap placed on his telephone." (Mot. Summ. J. at 8 (#44).)
4 Plaintiff supports his wiretapping claim with two allegations: (1)
5 alleged statements by Defendant Holly Vance to Plaintiff in which
6 she stated she had evidence of Defendant's wiretap but refused to
7 provide the evidence to Plaintiff or this court, and (2) the
8 presence of loud noise on Plaintiff's telephone line after he
9 initially contacted Defendant Helzer and the disappearance of the
10 noise shortly after he met with Helzer in Helzer's office. See
11 supra Part I.

12 Both Helzer and Vance have released sworn affidavits denying
13 Plaintiff's allegations of a wiretap and the existence of any
14 evidence indicating a wiretap. (Mot. for Summ. J. Exs. A, B (#44).)
15 Vance has sworn she has no recollection of any conversation with
16 Plaintiff. (Id.) Plaintiff has failed to provide any evidence
17 whatsoever of his interactions with Vance, nor has he supplied any
18 evidence indicating a wiretap on his telephone. With sworn
19 affidavits directly contradicting his allegations against Helzer and
20 Vance, no reasonable juror could conclude that Helzer placed a
21 wiretap on Plaintiff's phone. Plaintiff's allegations of the
22 emergence and disappearance of static noise on his telephone around
23 the dates of his interactions with Helzer are mere conclusory
24 allegations that do not constitute evidence. While Plaintiff's mere
25 conclusory allegation of a wiretap was enough to narrowly survive a
26 motion to dismiss, a complete failure of proof will not demonstrate
27 a genuine issue of material fact sufficient to survive a motion for
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1 summary judgment, even when viewing the evidence in a light most
2 favorable to Plaintiff. Plaintiff has provided no evidence, only
3 conclusory allegations, of his Fourth Amendment claim; Defendant
4 Helzer is therefore entitled to judgment as a matter of law.¹
5 Celotex, 477 U.S. at 323.

6 **B. Plaintiff's Request for Discovery**

7 Plaintiff seeks evidence of the alleged wiretap from Defendant
8 Vance through discovery under Federal Rule of Civil Procedure 26
9 (b)(1). (Mots. Relief J. & Default J. at 11 (#42).) We previously
10 granted Plaintiff's prior request for discovery on July 25, 2011
11 (#31), with a deadline of March 1, 2012 (#39).

12 Under Federal Rule of Civil Procedure 26(b)(2)(C)(ii), district
13 courts are permitted to limit discovery if "the party seeking
14 discovery has had ample opportunity to obtain the information by
15 discovery in the action." Plaintiff has had ample time to obtain
16 documents from Holly Vance, but the only evidence that has surfaced
17 from her is a sworn affidavit that she has no documents indicating a
18 wiretap. (Mot. Summ. J. Ex. A (#44).) Plaintiff has passed the
19 deadline for discovery and provided no plausible reason for
20 conducting further discovery. His request under Rule 26(b)(1) must
21 therefore be denied.

22 **C. Plaintiff's Motion for Relief from Judgment (#42)**

23 Plaintiff seeks relief from this court's earlier judgments (##
24 32, 40) under Federal Rule of Civil Procedure 60(a). (Mots. Relief

26 ¹ Additionally, Plaintiff's failure to file an opposition to
27 Defendant Helzer's Motion for Summary Judgment (#44) constitutes
28 consent to the granting of the motion pursuant to Local Rule 7-2(d).

1 J. & Default J. p. 1 (#42).) However, Rule 60 is reserved for
2 "extremely minor and extremely dire circumstances." Snell v.
3 Cleveland, Inc., 316 F.3d 822, 826 (9th Cir. 2002). Moreover, Rule
4 60(a), which provides relief only in cases of "a clerical mistake or
5 a mistake arising from oversight or omission," has been interpreted
6 narrowly to apply only to clerical and technical mistakes. Id.
7 Plaintiff alleges no clerical errors by this court, instead reciting
8 case law in an unproductive effort to breathe life into his
9 dismissed claims against Defendants. Plaintiff has therefore not
10 establish that he is entitled to relief under Rule 60(a).

11 Nor does Rule 60(b) provide the relief Plaintiff seeks. Rule
12 60(b) allows relief from judgment in six circumstances: "(1)
13 mistake, inadvertence, surprise, or excusable neglect; (2) newly
14 discovered evidence . . . ; (3) fraud . . . misrepresentation, or
15 misconduct . . . ; (4) the judgment is void; (5) the judgment has
16 been satisfied, released, or discharged . . . ; or (6) any other
17 reason that justifies relief." Plaintiff alleges no new evidence or
18 facts in his motion and simply reiterates various cases in support
19 of his earlier claims. These and related cases have already been
20 considered in our earlier Order (#32), and we are unconvinced that
21 Plaintiff has introduced any new law that would indicate a "mistake,
22 inadvertence, surprise, or excusable neglect" on our part,
23 especially given the "extremely minor" or "extremely dire"
24 circumstances required to grant a Rule 60 motion. See Snell, 316
25 F.3d at 826.

26 Plaintiff's motion also fails under Rule 60(b)(6)'s catchall
27 provision, the applicability of which has been limited to

1 "extraordinary circumstances." Ackermann v. United States, 340 U.S.
2 193, 199 (1950). See also Kramer v. Gates, 481 F.3d 788, 792 (D.C.
3 Cir. 2007) ("Plaintiffs must clear a very high bar to obtain relief
4 under Rule 60(b)(6)"); In re Guidant Corp. Implantable
5 Defibrillators Products Liab. Lit., 496 F.3d 863, 868 (8th Cir.
6 2007) (finding relief under Rule 60(b)(6) to be "exceedingly rare").
7 Here, Plaintiff essentially restates the argument we rejected in our
8 earlier Order (#32), and therefore fails to establish "extraordinary
9 circumstances" for relief. Rule 60 does not provide a vehicle for
10 Plaintiff to re-litigate issues the court has already decided
11 because he disagrees with the court's decision. Plaintiff's Motion
12 for Relief from Judgment (#42) is therefore denied.

13 **D. Plaintiff's Motion for Default Judgment (#42)**

14 Plaintiff claims that he is entitled to a default judgment
15 pursuant to Federal Rule of Civil Procedure 37(b). (Mots. Relief J.
16 & Default J. at 11 (#42).) Under Rule 37(b)(2)(A)(vi), a court may
17 enter a default judgment against a party that fails to comply with a
18 court order to provide or permit discovery. Plaintiff claims that
19 this court previously ordered Defendant Holly Vance to produce
20 evidence of the alleged wiretap. (Id.) This court has issued no
21 such order. Moreover, from the sworn affidavits of both Vance and
22 Helzer, this court has determined that no such evidence exists.
23 Plaintiff's Motion for Default Judgment is denied.

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IV. Conclusion

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Plaintiff has offered no evidence that Defendant Helzer placed
a wiretap on his phone. Plaintiff's allegations are insufficient to

1 establish a genuine issue of material fact in this regard.
2 Furthermore, Plaintiff has offered no valid reason for the Court to
3 depart from its earlier rulings.

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5 **IT IS, THEREFORE, HEREBY ORDERED** that Defendant John W.
6 Helzer's Motion for Summary Judgment (#44) is **GRANTED**.

7 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Relief from
8 Judgment and Motion for Default Judgment (#42) **are DENIED**.

9 **IT IS FURTHER ORDERED** that Plaintiff's request for discovery
10 under Federal Rule of Civil Procedure 26(b)(1) is **DENIED**.

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12 The clerk shall enter the judgment accordingly.

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15 DATED: July 16, 2012.

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17 UNITED STATES DISTRICT JUDGE